IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 934.

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian, *Petitioner*,

v.

UEBERSEE FINANZ-KORPORATION, A. G., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia (R. 7) is reported at 158 F. 2d 313. There was no opinion by the District Court.

JURISDICTION.

The jurisdiction of the Court of Appeals for the District of Columbia rests upon § 17 of the Trading with the Enemy Act. Its judgment was entered on October 21, 1946 (R. 11-12). Petition for a writ of certiorari was filed on January 20, 1947 and was granted on February 17, 1947 (R. 12). Jurisdiction of this Court rests on § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Section 5(b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, provides in part (*infra*, App. pp. 46-47):

> Any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *

Section 9(a) of the Trading with the Enemy act provides in part (*infra*, pp. 48-49):

> Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasury of the United States or the interest therein to which the court shall determine said claimant is entitled.

The question presented is whether amended § 5(b), has so amended, *by implication*, the *express* language of § 9(a) as to cut off the right of a friendly foreign national, suing in respect of property in which there is not a scintilla of enemy- or ally-of-enemy- interest or control, to pursue the remedy and obtain the relief provided by the explicit language of § 9(a).

STATUTES INVOLVED.

The relevant portions of the Trading with the Enemy Act, as amended, Executive Orders and Treaty are set forth in Appendix, p. 45, *et seq.*

STATEMENT.

By a series of vesting orders issued June and July, 1942, the Alien Property Custodian vested in himself certain shares of stock (consisting principally of the controlling interest in a brewery and the controlling interest in an independent chain of gasoline distribution stations) and a minor interest in a contract which were the property of respondent. On October 25, 1944 respondent filed a complaint in the District Court for the District of Columbia setting out that it had been organized under the laws of Switzerland in 1922 and was a citizen of Switzerland, alleging that it was neither an "enemy", "ally of enemy", or "national of a designated enemy country" within the meaning of the Trading with the Enemy Act or the Executive Orders issued pursuant thereto, and alleging further, as clearly and unequivocally as language permits, that no interest or control whatsoever, either direct or indirect, was owned by an "enemy", "ally of enemy", or "national of a designated enemy country" (R. 1-4), and prayed for the return of the seized property.

The Government moved to dismiss the complaint on the sole ground that the plaintiff was a national of a foreign country (R. 4-5). Thus, upon the pleadings the Government admitted that at and before the date of the seizure and at the time of filing its motion, respondent was a

friendly foreign national, in no wise acting as an agent or cloak for an "enemy" or "ally of enemy" or for a "national of a designated enemy country", and that the property involved was in no wise colored with any interest of an "enemy" or "ally of enemy" or of a "national of a designated enemy country".

The District Court granted the motion and dismissed the complaint (R. 5).

The Court of Appeals for the District of Columbia, one judge dissenting, reversed and remanded the cause for trial, holding that § 5(b), while permitting initially the vesting of property of foreign nationals did not preclude an action by a friendly foreign national for the return thereof under § 9(a) (R. pp. 7-12).

SUMMARY OF ARGUMENT.

Section 9(a) (*infra*, pp. 48-49) of the Trading with the Enemy Act in explicit language provides that suit for the return of its or his property may be brought against the Custodian by any person not an enemy or ally of enemy. Section 7(c) (*infra*, pp. 47-48) of the Act expressly provides that "the *sole* relief and remedy of any person having any claim to any money or other property," seized by the Custodian, "shall be that provided by the *terms* of this Act." (Italics supplied)

The language of neither 9(a) nor 7(c) was amended or in any wise changed by the amendment to § 5(b) which was effected by the First War Powers Act of December 18, 1941 (*infra*, pp. 46-47).

Thus the Trading with the Enemy Act itself expressly excludes any remedy in any forum other than in the United States District Courts and expressly precludes any other relief to a friendly foreign national, such as respondent, than that provided by § 9(a). Since a friendly foreign national is entitled to the protection of the Fifth Amendment in respect of his property which is non-enemy in character (*Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 489) and

since § 9(a) of the Trading with the Enemy Act embodies the sole and exclusive remedy in respect of such property seized by the Custodian, to deny such friendly foreign national the privilege of resort to § 9(a) would bring the seizure provisions of the Act into head-on conflict with the Fifth Amendment.

In the lower Court and in its brief in this Court (point III, p. 54 *et seq.*) petitioner seeks to surmount this Constitutional impasse by an argument that amended § 5(b) permits of an interpretation which would allow to respondent the right to suit for just compensation in the Court of Claims. The validity of this argument is categorically denied. This contention of the petitioner is crucial and since it cannot be supported petitioner's entire case, on its Motion to Dismiss, collapses.

The provisions of the treaty between the United States and Switzerland require that Swiss nationals be granted relief and remedy in our courts identical with that accorded to American citizens. Petitioner's attempted interpretation of the Act, in its denial of a remedy under § 9(a) to a Swiss national, which remedy is admittedly available to an American citizen, would cause a direct conflict with the treaty.

There is nothing whatsoever in the language of amended § 5(b) which is in any wise inconsonant with the express language of either § 9(a) or § 7(c). Petitioner's entire position rests entirely upon an insupportable theory of the repeal of these sections by pure implication. The pertinent portions of amended § 5(b) go no farther than to permit the taking of possession of, or at most, a defeasible title to, property of any foreign national and thereby to eliminate the necessity for the protracted investigation and the onerous responsibility of making the determination or finding by the Custodian that the property is actually owned or held for the benefit of an enemy or ally of enemy, which was required by § 7(c).

The provisions of amended § 5(b) relating to the sale or disposition of property seized or vested thereunder permit

no greater dominion over such property by the Custodian than was permitted by § 12 of the unamended Act in respect of property seized under § 7(c).[1]

In other words, just as a suit under § 9(a) effected an injunction against the exercise of the sale and disposition provisions of § 12, so a suit under § 9(a) continues to effect an injunction against the sale and disposition provisions embodied in amended § 5(b). In short, the sale and disposition provisions of amended 5(b) no more cut off the relief and remedy provided by § 9(a) than did the sale and disposition provisions of § 12 under the old Act. *Central Union Trust Company v. Garvan*, 254 U. S. 554, 569.

Despite its almost entire reliance upon these dispositive provisions of amended § 5(b) as a basis for the implied repeal of §§ 9(a) and 7(c), petitioner at no place in its brief even attempts to meet or dispose of the construction placed upon the dispositive provisions of § 12 in respect to seizures made under § 7(c).

In the actual administration of the Act, including amended § 5(b) thereof, the Alien Property Custodian interpreted the Act and the Executive Orders thereunder as herein contended for by the respondent. Despite the broad language of amended § 5(b) authorizing him to take the property of any foreign national, the Custodian in fact took over only such property as he suspected was owned or held for the benefit of an enemy or ally of enemy. He also set up within the Office of the Alien Property Custodian a Vested Property Claims Committee which returned property to foreign nationals upon investigation and determination that the same was not owned or held for an enemy or ally of enemy.

Despite repeated efforts to get the Congress to place its seal of approval upon petitioner's construction of amended § 5(b), Congress has not only steadfastly refused to do so,

[1] The term "unamended Act" is used as a matter of convenience to refer to the Trading with the Enemy Act as it existed prior to the amendment of §5(b) by Title III of First War Powers Act, Act of Dec. 18, 1941, 55 Stat. 839, U. S. C. App. Title 50, §5(b), U. S. C. App. Title 50, §§616-618.

but during its last session expressly insisted upon the construction of § 9(a) embodied in this brief.

In summary, the position taken by the attorneys presently representing the Custodian brushes aside the express language of §§ 9(a) and 7(c), brings about a head-on collision with the Fifth Amendment of the Constitution, presents a direct conflict with the Treaty with Switzerland, stretches the language of amended § 5(b) into an interpretation neither expressed nor intended by the Congress, throttles the administrative interpretation given to the Act and the Executive Orders thereunder by the Custodian himself, and flies into the teeth of the will of Congress expressed at its very last session and embodied in the following language of the Senate Committee Report (S. Rep. No. 1839, 79th Cong., 2d Sess.):

> The first amendment by the Committee strikes out line 11 on page 1 and down to and including line 16 on page 8 [the portion of the Bill which would have denied the right of a friendly foreign national to the relief and remedy of § 9(a)]. The purpose of this amendment is to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a). The Bill as thus amended preserves in full these rights under 9(a) which the friendly foreign national, together with the United States citizen, has had for more than 25 years under the Act. (Brackets supplied)

ARGUMENT.

I.

The Sole Relief and Remedy of the Respondent, a Friendly Foreign National, is that Provided by § 9(a) of the Trading with the Enemy Act.

(a) The Express Language of §§ 9(a) and 7(c) is Conclusive and Exclusive With Respect to Both Relief and Remedy.

By the express language of § 9(a) the only character of person having a disability to pursue the remedy and obtain the relief therein provided is an *enemy or ally of enemy*, as those terms are defined in § 2 of the Act:

> § 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover. (a) Any person not an *enemy or ally of enemy* claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him * * * *may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States* for the district in which such claimant resides * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled. *If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian * * * until any final judgment* or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian * * * on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (Italics supplied.)

Lest there should be attempt to raise any doubt as to whether the relief and remedy provided by § 9(a) was intended to be exclusive of any remedy in any other forum or of any relief different from that provided by § 9(a), the following language of § 7(c) was incorporated into the Act:

> (c) * * * *[4th ¶]
> *The sole relief and remedy of any person* having any claim to any money or other property heretofore or *hereafter* conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him *shall be that provided by the* terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. (Italics, brackets and bold face supplied)

(b) The Decided Cases Sustain the Fact That No Remedy is Available Under the Tucker Act in the Court of Claims or For Just Compensation in Any Court.

The availability of a remedy in the Court of Claims was the specific subject of controversy in the case of *Escher, Admr., et al.* v. *U. S.*, 68 C. Cls. 473; cert. den. 281 U. S. 752. There the plaintiff had brought suit in the Supreme Court of the District of Columbia and being dissatisfied with the relief granted, on the ground that it was not equivalent to just compensation, sought to recover just compensation in the Court of Claims. The latter court accorded full effect to the language of §§ 9(a) and 7(c) and denied relief. At pages 478-479 the court said:

> * * * When Congress provided the place and manner of commencing a suit on behalf of a person whose property had been seized and who was not an enemy or an ally of an enemy, the effect was to exclude all other jurisdictions. "Where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States* v. *Babcock*, 250 U. S. 328, 331. And this principle is especially applicable where Congress has

> conferred jurisdiction upon some court for the purpose of suit against the United States for compensation. *United States* v. *Pfitsch*, 256 U. S. 547, 552.

In the case of *Pflueger* v. *United States*, 121 F. 2d 732; 73 App. D. C. 364, cert. den. 314 U. S. 617, the lower court had occasion to pass on the question of the availability of any other relief than that provided by § 9(a). There the plaintiff had received back from the Custodian the proceeds of his property which had been sold by the Custodian. He then brought suit in the District Court of the United States for the District of Columbia to recover the asserted difference between the value of the property and the amount realized for it by the Custodian. The Circuit Court, in sustaining the dismissal of the complaint by the District Court, stated (p. 736):

> This being a suit against the United States (*Cummings* v. *Societe Suisse*, 66 App. D. C. 121, 85 F. 2d 287) and appellant not having brought himself within the terms of the Government's consent to be sued, the trial court was without jurisdiction and its decision to that effect was, therefore, clearly right and is affirmed.

It is quite apparent, therefore, putting aside at this point any purported effect of amended § 5(b), that the courts have determined that the language of §§ 9(a) and 7(c) means exactly what it says.

(c) No Logical Basis is Suggested for the Implied Substitution of a Tucker Act Remedy for That of § 9(a) of the Trading with the Enemy Act.

Aside from considerations of the inequity and the injustice of depriving an eligible claimant of his property in kind, there are substantial practical reasons why Congress prescribed the relief and remedy provisions of § 9(a). The forums provided are the various United States District Courts throughout the country, and not the Court of Claims, thereby making available a remedy at the place of residence

of the claimant—and it must be remembered that many persons whose property or interests are seized reside in the United States but outside the District of Columbia.

What is of much greater importance is the simplicity of the remedy provided. The sole issues under 9(a) are (a) whether or not the plaintiff is an enemy or ally of enemy, and (b) whether the property sued for was owned by or held for the benefit of an enemy. If these issues are decided negatively in favor of the plaintiff the litigation is at an end. There remains only the simple ministerial act of returning the property to the plaintiff or, in the event that before suit is brought the Custodian has sold the same, of delivering to the plaintiff a check for the proceeds.

For this relatively simple, expeditious remedy petitioner would substitute litigation which, of necessity, involves not only the identical issues triable in the district courts, but in addition thereto would superimpose a third very complicated issue, namely, that of the value of the property at the time it was taken. This Court needs no reminder that valuation controversies involve the litigant in the throes of the most complex, controversial, drawn-out type of litigation that our judicial machinery is concerned with.

We emphasize below (p. 13) the extreme reluctance of this Court to indulge in repeal by implication. Nowhere in amended § 5(b) and nowhere in its entire legislative history will be found a syllable to the effect that a Tucker Act or any other remedy was to be substituted for that of 9(a). Thus petitioner is not only confronted with the necessity of the "stark obliteration" of the language of § 9(a), but is compelled to legislate into amended § 5(b) language which is just not there.

And all of this to what purpose? What fanciful interests of the United States are to be served by an insistence that the Custodian have the right to retain property owned by a friendly foreign national which is devoid of any enemy interest? On petitioner's hypothesis, as urged in argument in the District Court, a friendly foreign national

would have an instantaneous right, upon a seizure, to sue for the money value of his property in the Court of Claims. Thus, in the instant case, the Custodian would have on his hands a brewery and a chain of retail gasoline stations and respondent would have gotten out of the Treasury a sum of money purporting to be the value thereof at the time of taking. But, it may be asked, Suppose the Government wanted the brewery or its output or the chain of retail gasoline stations for some purpose connected with the war effort? The answer is that the Government could have acquired them immediately and expeditiously, just as it could have acquired any property whatsoever, subject to its jurisdiction, whether owned by citizen or alien, by the simple, direct exercise of its vast and virtually unlimited powers of requisition and eminent domain and without any distortion of the Trading with the Enemy Act.

It is further to be kept in mind that property in respect of which a friendly foreign national might have obtained a judgment for return from the Custodian, nevertheless would have no other control over such property than was permitted by existing freezing regulations, and could deal with such property only as was permitted under such licenses as might be issued by the Treasury.

II.

Nothing Contained in Amended § 5(b) of the Trading with the Enemy Act Was Intended to Deprive a Friendly Foreign National of the Relief and Remedy Provided by § 9(a) of Said Act.

It is to be re-emphasized that the express language of § 9(a) was in no wise amended by amended § 5(b). It seems inescapable that had it been the intention of Congress to make so fundamental a change as to foreclose the remedy of § 9(a) to a friendly foreign national it unquestionably would have inserted into § 9(a), by way of amendment, the few words necessary to accomplish that purpose and simul-

taneously would have substituted constitutionally sufficient relief and remedy. This the Congress refrained from doing (see Point VI, *infra*), resulting in the necessity of petitioner's tacit resort to the tenuous proposition that § 9(a), insofar as it provides relief and remedy to a friendly foreign national suing in respect of non-enemy property, was impliedly repealed by amended § 5(b). The aversion of the courts to such implication has been repeatedly stated. *Aldridge, et al.* v. *Williams*, 3 How. 9, 27; *Posadas* v. *National City Bank*, 296 U. S. 497, 503-505. This Court has consistently adhered to the doctrine that a statute is not to be construed as impliedly repealing a prior law unless there is an *irreconcilable conflict* or *no other reasonable construction can be applied*. It is submitted that the cases cited by the petitioner in reference to this proposition (pet. br. p. 35) affirmatively support this principle and are in no wise authority for an implied repeal of § 9(a). The observations of this Court in the recent case of *Markham* v. *Cabell*, 326 U. S. 404, 410-411, apply with equal force in the instant case:

> The right to sue, explicitly granted by § 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission. We can find no indication in the 1941 legislation that Congress by amending § 5(b) desired to delete or wholly nullify § 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible.

Not only does petitioner's position require an implied amendment or repeal of § 9(a) (insofar as it relates to a friendly foreign national) but also of § 7(c) and of § 17 (*infra*, pp. 49-50). (The latter section expressly confers jurisdiction on the District Courts of the United States "to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process

as may be necessary and proper in the premises to enforce the provisions of this Act * * *.")

But there is a further and more readily apparent invalidity in the petitioner's position. In the District Court petitioner placed great reliance on the proposition, reiterated in substance in the circuit and in this court, that: "Since vesting of the plaintiff's property was authorized by § 5(b), the plaintiff has no right to compel its return." This *non sequitur* presents in bold relief the false premise from which flows a series of fallacious deductions respecting the interpretation of amended § 5(b). The mere fact that the Custodian is given authority to seize and vest property, under amended § 5(b), is by no amount of circumlocution tantamount to the proposition that he is *ipso facto* authorized to retain the same in the face of a suit under § 9(a). This is made clear when consideration is given to the general scheme of the whole Trading with the Enemy Act.

Under the unamended Act, the Custodian was given authority to seize or vest, without a hearing, and without any judicial proceeding, the property of anyone, even that of an American citizen, provided that he made the preliminary, although *ex parte*, determination that the property was enemy owned or held for the benefit of an enemy. Then, *provided no suit under § 9(a) was interposed*, he might sell or otherwise dispose of the property, under the powers given to him by § 12, despite the fact that his determination that the property was of enemy character later turned out to be unfounded. In case of sale prior to suit the deprived person's relief under § 9(a) is limited to the proceeds of sale.[2] It is to be emphasized that the Custodian's authorization was not to seize such property only as was in fact enemy in character (i.e. "* * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy * * *"), but was actually to seize and take

[2] By reason of § 7(c), 4th paragraph.

title to any property "which the President[3] after investigation *shall determine* is so owing, etc. * * *".

This procedure was held to be constitutionally permissible because, and only because, of the availability of the remedy provided by § 9(a). *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 81.

It is obvious therefore that the range or field of property subject to the Custodian's seizure authority under § 7(c) was much broader than that covered by his authority to retain: the two authorizations were not coextensive. Likewise the range of property vestible under amended § 5(b) does not define or measure the range of property retainable thereunder.

The scheme of the seizure and return provisions of the Act are excellently summarized in the scholarly opinion of Judge Knox in *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 F. 852, 859 (1918):

> And in the present legislation, at least so far as it affects the case at bar, there is no contravention of the Fifth Amendment of the Constitution. The very act, in section 9 thereof (Comp. St. 1918, § 3115½e), contemplates the possibility of mistaken action upon the part of the Custodian, and to the end that no loyal *citizen or friend* shall be deprived of his property without due process of law the section reads:
>
> (Here Section 9 is quoted)
>
> Under the provisions of this section the rights of a person who is not an enemy or ally of enemy are adequately protected. If the property which has come into the hands of the Custodian belongs to a citizen of the United States, or indeed *to a friendly alien*, the title of such person thereto is not finally divested. Any title which vests in the Custodian will be defeasible in its nature. Whether the defeasance, if it may be called such, shall operate, will depend upon the outcome of the proceedings to be instituted by the citizen or

[3] Under the authority of § 5(a), by reason of the delegation of authority to the Custodian, the determination was actually made by the Custodian. *Stoehr* v. *Wallace*, 255 U. S. 239, 245.

> *friendly alien*, who, in appropriate proceedings under section 9, asserts title to the property. Pending a determination of the issues arising in such proceedings, the possession at least, and perhaps a defeasible title, is in the Custodian, and as an administrative matter I do not see where else it could be, if the act is to have any salutary effect in the way of rendering enemy property unavailable for the purposes of the enemy. (Emphasis supplied.)

A somewhat more succinct analysis is embodied in the following excerpt from *Becker Steel Co. v. Cummings, supra*, 296 U. S. 74, 79:

> "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, *and such a seizure was lawful* even though the determination were erroneous. *Central Union Trust* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland, supra*, 30[[271 U. S. 298]. Instead by § 9(a) it gave to the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time, *by the all-inclusive language of § 7(c) it denied to him any other remedy.*" (Italics supplied)

A further excellent discussion of the plan of the Act, as related to seizure and return, is to be found in *Stoehr* v. *Wallace*, both in Judge Hand's opinion in the Circuit Court of Appeals, 269 F. 827, 833-835, and in the opinion of Justice Van Devanter in the Supreme Court, 255 U. S. 239, 241-246.

No doubt exists, therefore, that the Custodian's power to take was not tantamount to authority to keep. As Judge Knox pointed out, the seizure gave the Custodian something in the nature of a defeasible title. His legal relations in respect of non-enemy property which he seized were not those of a fee simple owner, despite the language

of Section 12 statitng that he "shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof." These powers of disposition and sale were his provided only that no suit was brought against him under § 9(a). This proposition is made clear in the opinion of Justice Holmes in *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569. There, persons in possession of property which the Custodian sought to seize with the aid of the District Court, argued that they were entitled to a determination of the ownership of the property by the court before being required to turn it over. To this argument the court replied:

> To to the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, enlarging § 12, the Custodian "shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed," etc., to him, and is given the power to sell and manage the same as though he were absolute owner. *All this may be conceded if no claim is filed. But this act did not repeal § 9*, which is amended by the later Acts of July 11, 1919, c. 6, 41 Stat. 35, and of June 5, 1920, c. 241, 41 Stat. 977, and as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing but the preleminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more. (Emphasis supplied.)

It is submitted that there is nothing in the language of amended § 5(b) which even suggests that the "disposition

and sale'' provisions thereof were to have any more effect by way of foreclosing the relief and remedy of § 9(a) than did the language of § 12 of the unamended Act in respect of seizures made under Section 7(e). This is best illustrated by observing the parallelism between the seizure and disposition provisions of the unamended Act and the vesting and disposition provisions of amended § 5(b):

§ 7(c)—Seizure Powers of Custodian	*Amended § 5(b)—Vesting Powers of Custodian*
If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian;	* * * and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, * * *

§ 12—Powers of Custodian With Respect of Seized Property

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof *in like manner as though he were the absolute* owner thereof * * * (Italics supplied)

Amended § 5(b)—Powers of Custodian in Respect of Vested Property

* * * and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

A close comparison will reveal that the dispositive or dominion provisions of § 12 are substantially stronger and more comprehensive than the dispositive or dominion provisions of § 5(b).

It is thus apparent that petitioner's reliance upon the sale and disposition provisions of amended 5(b) as creating

an irreconciliability with, and therefore an implied repeal of the remedy afforded by 9(a) is without substance. Since petitioner's attorneys rely almost entirely upon the sale and disposition language of amended § 5(b) to support their whole position, it seems nothing short of amazing that nowhere in their brief have they even undertaken to break down or even to criticize the reconciliation between the provisions of § 9(a) and the dispositive provisions of § 12 given in *Central Union Trust* v. *Garvan, supra*, 254 U. S. 554, 569, which presents a precise analogy to the reconciliation of § 9(a) with the dispositive provisions of amended 5(b).

Nor does the fact that the Custodian may pass perfect title to a purchaser of seized property alter this conclusion. Whether we treat the Custodian as acquiring by his taking, a defeasible title or a mere possession, in either event coupled with such defeasible title or possession he acquires a power—a power to pass good title to a purchaser, provided no suit under 9(a) has been instituted prior to the sale. The time between the taking and the sale is in the nature of a statute of limitations against the claimant. At any time up to sale the Act gives the claimant the power to cut off the power and prevent the sale by bringing suit. On the other hand, if the claimant stands by and allows the sale by the Custodian to take place, his right to the return of the *res* is tolled and he is relegated, by way of relief, to the proceeds of sale. § 7(c).

The question which remains then is, What purpose was sought to be accomplished by amended 5(b)? The answer seems quite apparent. It was to provide a net of the broadest dimensions to enable the seizing or vesting authority to expeditiously gather in, initially, any parcel of property within the broad domain of foreign national ownership upon any degree of suspicion that the same might be owned by or held for the benefit of an enemy. Under the unamended Act (§ 7(c)—1st ¶), although it was not necessary to the seizability of property that it in truth and in fact belonged to or was held for the benefit of an enemy or ally of enemy,

nevertheless it was a condition precedent to a valid seizure that it be predicated upon an investigation and formal determination or finding by the Custodian that it was owned by or held for the benefit of an enemy.[4]

By reason of the necessity of making this precedent determination or finding of enemy status of the property prior to seizure, onerous and time-consuming duties of administrative investigation were imposed upon the Custodian. Furthermore—and what was an equal or more cogent consideration—the Custodian was required to assume the weighty and stern obligation of making a responsible administrative determination or finding, which, if in the affirmative, could cast upon the property or business enterprise seized, the stigma of enemy ownership with all of the attendant dislocation and virtual "excommunication" which such determination would carry in its wake.

It was undoubtedly with these considerations uppermost in mind that Congress, in amending 5(b), made its language broad enough to permit the Custodian to vest the property of any foreign national at any time he entertained even a suspicion that the property involved was owned or held for the benefit of an enemy, with the consequent shifting to the claimant of the onus of establishing the non-enemy character of such property by forcing him to bring suit under § 9(a) of the Act. Thus Congress eliminated the onerous and time-consuming duties of extensive administrative investigation and relieved the Custodian of the burden of responsible decision which heretofore was imposed upon him, with all of the attendant possibilities of the escape of property in which enemy interests might exist or in which any enemy interests might be so concealed as to avoid ready detection by the Custodian's investigative force.

These considerations are blithely brushed aside by the petitioner in its present brief (pp. 46, 47). Its discussion

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[4] Property "which the President after investigation shall determine is so owing or so belongs or is so held." (7(c)).

Despite the requirement for this precedent investigation and determination there were, of course, many cases where the seized property turned out to be in fact not of enemy character.

effectually reads out of consideration that clause in § 7(c) reading, "which the President after investigation shall determine is so owing or so belongs or is so held." But this is not the position heretofore taken by petitioner in its brief in the District Court (pp. 10-11). The following were there stated as the underlying purposes of amended 5(b):

> There were strong reasons why a vesting power limited to property which *could be proved* to belong to enemies would have been ill-adapted to the conditions of this war. In recent years Germany (and to a lesser extent, the other Axis countries as well) had developed techniques for extending economic operations into foreign countries through "fronts" or "cloaks."[5] The multiple possibilities of corporate ownership were especially relied upon by Germany to conceal beneficial interests in assets in the United States. See United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), 29-31. Congress, aware of such cloaking, granted a power adequate to cope with it. By authorizing the vesting of all foreign property, it eliminated the jeopardy to the national interest which time-consuming search for enemy ownership would entail. (Bracketed footnote and italics supplied by respondent)

Thus interpreted, there is given to amended 5(b) pregnant, logical meaning and any question of constitutional infirmity is reduced to a refinement.[6] To adopt the lan-

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[5] (This footnote is respondent's and not petitioner's). Under § 7(c), 1st ¶, property "owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy" was specifically seizable by the Custodian. A "cloak" is nothing other than a person holding property for, by, on account of, or behalf of, or for the benefit of, an enemy or ally of enemy. A "cloak" very obviously would not be able to obtain the return under § 9(a) of property so held.

[6] It has been intimated that the preliminary determination of enemy character despite its *ex parte* nature, may constitute an element of procedural due process. *Stoehr* v. *Wallace*, *supra*, 255 U. S. 239, 245-246.

guage of the Supreme Court in *Becker Steel Co.* v. *Cummings, supra,* 296 U. S. 74, 81, in dealing with a not dissimilar statutory-construction problem in reference to § 7 of the Act, it may be tersely stated:

> Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court, to give to citizens and *alien friends* an adequate remedy for invasions of their property rights in the exercise of the war powers of the Government. *Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies.* (Emphasis supplied.)

From the discussion under this point it seems quite apparent that by amended § 5(b), in conferring upon the Custodian the power to vest, the Congress did not *ipso facto* intend to give such an indefeasible, unconditional title over seized property as to preclude to a friendly foreign national the relief and remedy provided by § 9(a); nor by spelling out the Custodian's powers over vested property did it intend to do more than § 12 of the Act accomplished in respect to seizures made under § 7(c).

Petitioner, however, seeks to derive comfort from certain excerpts out of the legislative history which preceded the enactment of amended § 5(b) on December 18, 1941. This legislative history is quite amorphous and confused. However, it is submitted that a careful review of the fragments which make up that history will leave small doubt that the Congress was concerned in precluding the escape of enemy property, and, more particularly, that there never was a Congressional intent to wipe out the relief and remedy provided by § 9(a):

When Title III of the First War Powers Act was first presented by the departments to Congress it embodied a

Title III which would merely have re-enacted the Trading with the Enemy Act in its then form.

The Government representatives who appeared before the Judiciary Committee were two lawyers from the Treasury Department. After the Judiciary Committee and these gentlemen had gone over Title III as proposed in H. R. 6206, the Committee directed that they spell out their proposed legislation in lieu of the blanket reenactment of the Trading with the Enemy Act by reference. To this suggestion Mr. Cox, of the Treasury, made the following reply:

> Suppose I get in touch with the Legislative Counsel of the House and see if we cannot put in in its complete text the Overman Act, and the Trading with the Enemy Act and all of the amendments which seem to me to be essential to the issue here, leaving the substance of 301 integrated with the full text? (Unpublished Hearings Before House Committee on the Judiciary on H. R. 6206, Dec. 12, 1941.)

After the re-drafting of Title III was accomplished it was incorporated into H. R. 6233 (77th Cong., 1st Sess.) and re-introduced on December 15, 1941 with H. R. Rep. No.

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[1] H. R. 6206, 77th Cong., 1st Sess., introduced on December 11, 1941, incorporated as "Title III—Trading with the Enemy Act" the following:

Sec. 301. All of the provisions of the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411), together with all of the amendments to such Act, which have for any reason ceased to be in effect, are hereby reenacted: *Provided, however,* That no such provision or part thereof shall become operative until such time or times as the President shall find and by Executive order declare that it would be advantageous in the prosecution of the war for such provision or part thereof to become operative. The President is authorized to issue regulations to carry out any provision or part thereof of the Trading with the Enemy Act or any amendment thereto which becomes operative pursuant to this section; and he may exercise any power or authority conferred upon him or any other officer or agency by such Act and amendments thereto through any officer or agency that he may designate or otherwise. The definitions or terms appearing in any provision of the Trading with the Enemy Act or amendments thereto, shall not be construed as a limitation of the power which is hereby conferred upon the President to prescribe from time to time definitions or interpretations consistent with the purposes of this section and the present state of war.

1507. On December 16 the bill was discussed on the floor of the House and passed on that day. Also on December 16 a companion bill, S. 2129 (S. Rep. No. 911) was discussed on the floor of the Senate and on December 17, H. R. 6233 was substituted for S. 2129 and passed on that day. This bill, embodying the present amended § 5(b) as Title III, was approved by the President on December 18.

It is apparent from discussion on the floor of the House that the new legislation was a slight, if any, deviation from the powers given to President Wilson during the first World War, and that the underlying thinking was that the Congress was concerned in respect of the vesting provisions of amended 5(b), with enemy property. The following passages are illustrative (87 Cong. Rec., Pt. 9):

Representative Fish (p. 9856): "* * * This bill merely gives the President the same powers that were given to Woodrow Wilson in the last war * * *

"Title III deals with the Trading with the Enemy Act, the old Trading with the Enemy Act, with certain additional powers giving the President control over communications with foreign nations, also giving the President the power *to use property of the enemy that we may confiscate.* In the last war the President could confiscate every [obviously '*enemy*'] property but we were not able to use it to our own advantage. This bill gives him that additional power. * * * (Italics and brackets supplied)

* * * * * * * * * *

Representative Sumners, Chairman of the Judiciary Committee (p. 9858):

"* * * This bill attempts to bring into one legislative enactment what is regarded to be those provisions of the Overman Act and Trading with the Enemy Act which it is required to legislate relative to now. * * *"

* * * * * * * * * *

Mr. Jenkins (p. 9859):

"The gentleman may have covered the point I am about to ask him for; I was not here when he started.

Has the gentleman covered the main differences between this bill and the powers granted to President Wilson in the first World War?"

. . . . . .

Mr. Sumners:

"I made the general statement that I believed for all practical purposes we may say there is no substantial difference. Some modifications have been made that were deemed necessary. Guided by experience certain modifications have been made, but I believe I can state generally and that the members of the Committee will generally agree, that there is no *substantial* difference between the provisions of this bill and the similar grants of power in the Overman Act and the Trading with the Enemy Act." (Italics supplied)

. . . . . .

Mr. Jenkins:

"I have the most profound respect for the gentleman and his committee but have wondered whether there was any controversy at all over this bill. The reason I am asking these questions is so that if I am asked about the bill I will know something about it, and want to say that the great Judiciary Committee of the House considered it and unanimously agreed on its report."

. . . . . .

Mr. Sumners:

"The Committee on the Judiciary did examine the bill. We recognize that it was a technical matter and pretty difficult for us to know all the details. The committee was largely persuaded by the discovered facts, the recognized facts, that there is no substantial difference *insofar as the committee could discover* between the powers we propose to grant to this President *and the powers which President Wilson had.* That is about as much as I can say." (Italics supplied)

. . . . . .

Representative Springer (p. 9865):

"The other provision of the bill, and I refer to title III, with respect to 'trading with the enemy', has prac-

tically the identical provisions, as I understand it, that the bill contained which was in force during the last World War. * * *"

Taking the foregoing excerpts from the discussion on the floor, together with those quoted in the petitioner's brief, we find not a scintilla of reference to any proposal to repeal § 9(a), § 7(c), § 12, or § 17 of the then existing Trading with the Enemy Act.

When the bill came before the Senate, the underlying purpose of reviving the old legislation was the dominant idea. When the bill was reported out, Senator Barkley referred to it as a bill "which reenacts and revives the provisions * * * of the Trading with the Enemy Act" (87 Cong. Rec., Pt. 9, pp. 9789 and 9837).

Senator Van Nuys, Chairman of the Judiciary Committee of the Senate, made this response to a query in respect of the provisions of the bill (p. 9838):

> "In a nutshell, the bill grants to the President of the United States *the same war powers* that were exercised by President Wilson during the last World War—and exercised by him with a great degree of success." (Italics supplied)

It is the fact that he also stated:

> "* * * when it comes to the Trading with the Enemy Act, in the provisions for seizure and freezing of alien property, it goes further, and not only freezes it, but seizes the property; *possession* of it vests in the United States, and the property is to be liquidated and disposed of under the rules and regulations of the Department. To that extent it exceeds the powers granted President Wilson." (Italics supplied)

However, when we come to the language of the Senate committee report, which, it is submitted, is the most authoritative statement of purpose upon which all members of either House are entitled to rely, we find the following statement as the concluding part of the report in respect of Title III (S. Rep. 911—77th Cong. 1st Sess., p. 2):

"This provision of the bill to a considerable extent follows the pattern of existing law and is a logical extension of the present foreign property control system, which has been operating very satisfactorily for almost 2 years. The extension could be put into immediate operation with a minimum amount of trouble or dislocation of legitimate activities.

"It is essential that the Government have this power, a power exercised by every other wartime government *and exercised by this Government during the last war.*"

Thus, on a review of the legislative history of the bill in the Senate we again nowhere find a single reference to § 9(a) or § 7(c) or to any proposal to repeal those provisions of the Trading with the Enemy Act which it was the dominant purpose of the First War Powers Act to give effect to.

Having in mind that the complete consideration of amended § 5(b) in both Houses was on only parts of two days (December 16 and 17) and the utterly indecisive and conflicting statements which make up its legislative history, it is quite audacious on the part of petitioner to place the weight it does on fragments of that history as support for its interpretation of the section.

III.

Denial of the Relief and Remedy Provided by Section 9(a) Would Conflict with the Fifth Amendment to the Constitution.

In construing the Act, prior to the enactment of amended § 5(b), the courts have repeatedly held that the relief and remedy provided in § 9(a) (which were determined to be constitutionally adequate) were necessary as to one not an enemy or ally of enemy in order to save the constitutionality of the seizure provisions. *Stoehr* v. *Wallace*, 269 F. 827, affirmed 255 U. S. 239; *Becker Steel Co. of America* v. *Cummings, et al.*, 296 U. S. 74, 81.

Therefore, if the remedy under 9(a) is no longer available, then unless the Trading with the Enemy Act, includ-

ing amended § 5(b) admits of a remedy in the Court of Claims for just compensation, the vesting provisions of amended § 5(b) are in conflict with the Fifth Amendment.

It is conceded by respondent that with respect to *enemy property* the United States may deal in any manner it chooses even to the extent of outright confiscation. *Miller* v. *United States*, 11 Wall. 268, 306 (1870); *United States* v. *Chemical Foundation*, 272 U. S. 1, 11 (1926). The converse, however, is true with respect to property which is of non-enemy character. Such property, within the United States, is entitled to all of the safeguards of the Fifth Amendment even though owned by, or held for the benefit of, a foreign national. In this respect the citizen-owner and the alien-friend-owner stand on exactly the same footing. This firmly entrenched principle of constitutional law is clearly and unequivocally enunciated in the land-mark case, *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489:

> The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution.

This constitutional proposition appears to have been accepted, although somewhat grudgingly, by the petitioner in the lower court. It is the acceptance of this doctrine which compels resort on the part of the petitioner to the strained construction of amended § 5(b) to permit of a remedy to respondent in the Court of Claims for just compensation. It is felt that it has been amply demonstrated in Point I above that any attempted interpretation of the Trading with the Enemy Act to allow a remedy for just compensation is untenable.

IV.

Denial of the Relief and Remedy of § 9(a) Would Conflict with the Treaty Between the United States and Switzerland.

To compel this respondent to resort to a just compensation suit in the Court of Claims, upon any strained interpretation of amended § 5(b), would require negation of Article I of the Treaty of Friendship, Commerce and Extradition between the United States and Switzerland (11 Stat. 587) Senate Document No. 357, 61st Congress, 2d Session, page 1764. (*Infra*, p. 50)

Nowhere, nor at any time, has it even been suggested by petitioner that the relief and remedy of § 9(a) of the Act is no longer available to an American citizen. Nor has it been suggested that an American citizen whose property may have been vested by the Custodian, pursuant to amended § 5(b), has a just compensation remedy in the Court of Claims. See *Escher, Admr. et al.* v. *U. S.*, 68 C. Cls. 473. Under petitioner's interpretation of the Act, including amended § 5(b), we find the American citizen claimant in full possession of the right to the relief and remedy of § 9(a) and a simultaneous denial of that relief and remedy to the citizen of Switzerland. The pertinent portion of the Treaty reads as follows:

> Article I. The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland * * * shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice *in the same manner as native citizens*, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. *No pecuniary or other more burdensome condition* shall be

imposed upon their residence or establishment, or *upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.*

The foregoing privileges, however, shall not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors. (Italics supplied)

Under petitioner's "escape" interpretation of amended § 5(b), the only remedy suggested as available to a friendly Swiss national would be a suppositious suit in the Court of Claims for just compensation. Just compensation means the value at the time of taking.[a] It is apparent that if the value of the property vested by the Custodian substantially increased after the vesting by the Custodian, a friendly Swiss national would not only be deprived of his actual property but also of this increment in value and would be compelled to accept the value at the time of the taking.

Under § 9(a) of the Act the American citizen, whose property may have been vested, by bringing suit against the Custodian prior to a sale, may recover the vested property itself and thereby have the advantage of the incremental value. Thus a discrimination which may often be a very substantial one is effected in the treatment of the American citizen on the one hand, and the friendly Swiss national on the other. It is submitted that this is a striking example of the very character of discrimination which the Treaty was intended to prohibit.

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[a] "The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. (cases) Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. (cases) And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking." (cases). *Russian Volunteer Fleet* v. *United States*, *supra*, 282 U. S. 481, 489.

Petitioner's attorneys seek to avoid the conflict between the Treaty and their interpretation of amended § 5(b) by the half-device of the argument that Article I of the Treaty is inapplicable to corporations (Pet. br. pp. 64-65). They refer, in support of this inapplicability, to a letter dated January 3, 1934 from Acting Secretary of State Phillips to the Swiss Minister. They there point out that the construction of a Treaty by the Department of State is entitled to considerable weight with which respondent agrees. It is nevertheless noteworthy that the Swiss Government did not accede to Mr. Phillips' interpretation of the Treaty. The Swiss Minister's reply to Mr. Phillips' letter (MS, Department of State, File 811.5034/170), quoted in III Hackworth, *Digest of International Law*, 432-3, is set out in the appendix, (*infra*, pp. 50-51) and contains a very interesting analysis of the contents of Mr. Phillips' letter.

But the question whether or not Article I of the Treaty covers corporations is substantially beside the point when dealing with the broad question of the construction of amended § 5(b). Conceding *arguendo* that Article I of the Treaty is not applicable to corporations, can there be any doubt that as to natural persons there is a head-on conflict between the Treaty and petitioner's interpretation of amended § 5(b)? Unable to answer this query, petitioner's attorneys are forced to the statement (pet. br. p. 66), "If there were conflict between § 5(b) and a Treaty provision, § 5(b), being later would prevail."

Then *in extremis* petitioner's brief says (p. 67):

> "But we submit that there is no possible conflict with any of the provisions of the treaty. Plainly the denial of the substantive right to recover vested property is not a denial of access to the courts within the meaning of Article I; Swiss nationals may have their day in court, both in the district court in proceedings under § 9(a), and in the Court of Claims or the district court under the Tucker Act."

Petitioner's whole position is that respondent is in the wrong court and that under no conceivable circumstances

can petitioner have the relief provided by § 9(a). Its Motion to Dismiss before this Court is "because the complaint fails to state a claim upon which relief can be granted inasmuch as it appears on the face of the complaint that plaintiff is a national of a foreign country * * *". Just what is meant by "their day in court * * * under § 9(a)" is beyond the range of the mental spectrum of respondent's counsel. Enlightenment on this score must, therefore, come from petitioner.

The courts cannot be expected to be other than extremely reluctant to permit any tenuous interpretation of a statute to effect a repeal of the provisions of the Treaty[*] with the consequent international complications arising therefrom.

V.

The Actual Administrative Interpretation by the Custodian of §§ 9(a) and Amended 5(b) Accorded with the Interpretation Herein Contended For.

The actual practice and philosophy of the Custodian in Administering the Act, irrespective of the seeming breadth of the vesting scope of amended 5(b), indicates clearly that he interpreted the intent of Congress in the same manner as herein contended for. The Custodian's obvious recognition of the tenuous constitutionality of the position taken in the current brief in his behalf is well illustrated by a summary reference to some of the highlights of his actual practice under the Act and the efforts made to avoid the constant threat of constitutional infirmity in any attempted exercise of the "plenary" authority contended to be his under the pertinent portions of Section 5(b).

Some months after 5(b) was amended (December 18, 1941), Executive Order 9095 (*infra*, pp. 52-53) was promulgated pursuant thereto, on March 11, 1942. This was the Order which set up the Office of Alien Property Custodian and purported to give the Custodian the very

[*] Cf. *Johnson* v. *Gearlds*, 234 U. S. 423, 439.

broad authority to vest the property of "any foreign country or a national thereof" whenever he should so direct. The early vesting orders were issued pursuant to this executive order and were usually short documents merely making the determination that the seized property was owned by a foreign national, and ending with a paragraph reciting that "any person not a national of a foreign country designated in Executive Order 8389" might file a claim with the Custodian for the return of his property. Several of the vesting orders in the instant case, in their initial form, were issued under authority of this executive order.

Despite the ostensible basis for the vestings made under Executive Order 9095, namely ownership by a "foreign national", actually the basis for vesting was an assumption [10] that the property involved was in some wise enemy-owned. As a matter of fact, the Custodian never vested any property other than on a suspicion of enemy ownership,[11] even under the broad language of E. O. 9095.

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[10] "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable." *Stoehr* v. *Wallace*, *supra*, 255 U. S. 239, 245.

[11] Little or no light is shed on the rationale underlying the relevant portions of amended 5(b) by the legislative history of Title III of the First War Powers Act, 1941. However, real light is shed on the purposes and objectives of amended 5(b) in the hearings on H. R. 4840, 78th Congress, 2d Session, "A Bill to Amend the First War Powers Act, 1941". The latter Bill (which finally died in Committee) had among its purposes that of obviating the serious constitutional infirmities of amended 5(b) as that section is sought to be interpreted by defendant's present attorneys.

In the course of the hearings, a telegram of protest was sent to the Committee, raising constitutional and international policy objections to the proposed Bill. To this telegram the Assistant General Counsel of the Alien Property Custodian's Law Bureau, who had been carrying the laboring oar before the Committee, was invited to, and did, reply on June 22, 1944:

> In closing, it may be of interest to the Committee to know that the Custodian has not vested, and has no present intention of vesting, the property of foreign nationals *other than those in enemy or enemy-occupied territory* and cloaks. No un-

It is quite significant that after the Custodian had operated under E. O. 9095 for the short period of less than four months, E. O. 9193 (*infra*, pp. 53-57) was promulgated on July 6, 1942, as an amended form of E. O. 9095. This later executive order, particularly Paragraph 2 thereof, was couched in language much more restrictive of the Custodian's authority to vest, than the language of E. O. 9095. Following July 6, 1942 the Custodian's vesting orders were predicated on ownership or interest of "a national of a designated enemy country",[12] and ended with a paragraph reciting that "any person not a national of a designated enemy country" could file a claim for the return of his property.

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necessary dislocation of the rights of friendly aliens is contemplated. However, Congress in the First War Powers Act, 1941, conferred the power to vest the property of all foreign nationals. In order to reinforce the constitutionality of that Act, and to provide clearcut remedies in any case where it is necessary to exercise the vesting power to its full statutory extent, the provisions of Section 32** have been suggested. (Italics supplied.) (Hearings Before the Subcommittee on Judiciary, House of Representatives, 78th Cong., 2nd Sess. on H. R. 4840, p. 129)

* It is to be remembered, with reference to the italicized portions of the above statement of Mr. Cutler, that foreign nationals residing in either enemy or enemy-occupied territory are enemies within the meaning of Section 2 of the Trading with the Enemy Act.

** Section 32 of the proposed Bill was framed to give the friendly foreign national a cause of action in the Court of Claims.

See also the 1943-1944 report of the Custodian to Congress, House Doc. No. 184, 79th Cong. 1st Sess., particularly the letter of transmittal to the President appearing at pp. III-IV and "Objectives", p. 4, where it is made clear that the Custodian's practice was to vest property only of enemies or cloaks.

[12] As a matter of fact, in the instant case Vesting Order No. 51 was issued on July 10, 1942 and an amendment to Vesting Order No. 14 was issued on July 11, 1944. Both of these orders recited that "Any person except a national of a designated enemy country" might file a notice of claim with the Custodian for the return of the vested property.

Thus, even with respect to his authority to vest under the broad language of E. O. 9095—which is constantly to be contrasted with any authority to retain—the Custodian avoided taking over any property other than on an implied determination that the seized property was fraught with enemy interest. In this connection, it is not to be overlooked that the earlier broad Executive Order 9095, in conferring authority to vest the property of a foreign national contained the qualifying words (paragraph 3), "whenever the Alien Property Custodian shall so direct". The presence of this language, coupled with the delegation to the Custodian by E. O. 9095 of the authority given to the President by amended 5(b) to vest the property of a foreign national "when, as and upon the terms, directed by the President", makes it logical to take the position that the Custodian's uniform administrative practice was tantamount to a regulation promulgated by him that no property, other than that involving enemy interests, should be vested.

But, in addition to what has been said as to the Custodian's interpretation of his authority to vest, it is to be more heavily emphasized that in actual administrative practice he interpreted amended 5(b) and the Executive Orders issued pursuant thereto as giving him very doubtful, if any, authority to retain the non-enemy property of a friendly foreign national. After the promulgation of E. O. 9193, the Custodian made return of property which had been vested between March 11, 1942 (the date of E. O. 9095) and July 6, 1942 (the date of E. O. 9193), i.e., property which was seized under the broad language of the earlier executive order as property of a "foreign national." The Custodian made such return on the basis of a showing that the owner was not "an enemy or ally of enemy country" or "national of a designated enemy country". The reasons prompting this administrative policy, including several references to the constitutional problems inherent in a contrary policy, are illuminatingly set out in the opinion accompanying the divesting order "In the Matter

of Leopold H. P. Klotz, et al", Dockets Nos. 9 and 10, Claims Nos. 553 and 554. A copy of the pertinent portions is set out at pp. 37-41 below. It is urgently insisted that this practice of the Custodian in returning non-enemy property to friendly foreign nationals completely complied with the intent of § 9(a).

Petitioner's present attorneys seek to negative the effect of the Custodian's administrative practice by suggesting that he entertained doubt as to his authority to make such returns as were made in the Klotz case (pet. br. p. 33). They also seek to demonstrate that the passage of Public Law 322, 79th Cong. 2d Sess., March 8, 1946, which added § 32 to the Trading with the Enemy Act and which had for its chief purpose that of empowering the Custodian to make administrative return of property to enemy aliens, establishes a doubt that § 9(a) was understood by Congress to permit judicial returns of property under § 9(a) (pet. br. pp. 52-54).

The reply to these contentions is embodied in the Annual Report, Office of Alien Property Custodian, Fiscal Year Ending June 1945, pp. 161-162, set out in the Appendix hereto (*infra*, pp. 63-65). The fact that the Custodian was given *administrative* authority under public Law 322 to return property to enemies, and in certain instances to non-enemies, seems hardly a logical basis for the denial to the courts of *judicial* authority to return property to friendly foreign non-enemies.

VI.

Congress, During Its Last Session, Expressly Repudiated Petitioner's Attempted Construction of Amended 5(b) and Expressly Reaffirmed the Construction of § 9(a) Contained Herein.

Upon consideration of the foregoing points, without more, it is respectfully submitted that no doubt can reasonably be entertained that amended 5(b) did not and was not intended to cut off the right of a friendly foreign na-

tional to the relief and remedy prescribed by 9(a). But if a scintilla of doubt could possibly linger, such doubt is completely and unequivocally dissipated by the explicit action of Congress it self in its last session (79th Cong., 2d Sess.) in enacting the most recent amendment to the Trading with the Enemy Act (P. L. 671—79th Cong.; Chapter 878, 2d Sess.) 60 Stat 925; Title 50 Appendix U. S. C. §§ 33-38.

In the latter part of 1945 Representative Sumners, Chairman of the House Judiciary Committee, introduced, at the behest of the Government, H. R. 5089 to amend the Trading with the Enemy Act. This bill would have added a Section 33 to the Act reading as follows:

> Sec. 33. (a) A foreign country or national thereof within the meaning of section 5(b) hereof may not institute, prosecute, or further maintain a suit pursuant to section 9(a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof.
>
> (b) Notwithstanding the provisions of section 7(c) hereof, suit may be instituted by any person not an enemy or ally of enemy against the United States in the Court of Claims for just compensation in respect of any property or interest taken from the plaintiff and vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), but the complaint in such suit shall be dismised on the merits unless the plaintiff establishes that he is a person entitled to just compensation by virtue of the last clause of the fifth amendment to the Constitution of the United States.

At the hearings held on H. R. 5089 there was introduced into the record a letter dated February 4, 1946, from Mr. Byrnes, Secretary of State, addressed to the Chairman of the House Committee on the Judiciary, embodying Mr. Byrnes' invited comment on the Bill. While Mr. Byrnes' most cogent objection was to the last clause of sub-para-

graph (b) of Section 33, his more general comments in respect of the necessity of equality of treatment of foreign-owned property in the United States to that accorded American-citizen-property is enlightening.[13]

[13] Mr. Byrnes' letter is set out in full at pp. 28-29 of "Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 2d Sess. on H. R. 5089". The following is excerpted therefrom:

The position of the Government of the United States has consistently been that American property and other interests abroad are entitled to fair and equal treatment as compared with locally owned property. The possibility that diplomatic representations might cure a discrimination has not been thought a reason for failing to object to legislation discriminating against American interests. Moreover, the United States has always insisted upon the principle of adequate compensation if American property interests abroad were affected. Nor would the possibility of a ruling, at some date in the future, interpreting the fifth amendment in a manner contrary to that taken by the Department of Justice, cure the dangers of the clause cited.

The embarrassment to this United States policy stated which is inherent in the underlined language is apparent. Should nationalization of a given type of property be accomplished in a foreign country, the Department would not—if section 33 (b) as now drafted becomes law—be able to insist that the legislation implementing such nationalization provide either equal treatment for American interests or adequate compensation for interests which were taken. The importance of this question cannot, especially at present, be minimized.

Traditionally, the United States has encouraged foreign investment in the United States, and has regarded favorably American investment in friendly foreign countries, subject only to overriding considerations of national security. The United States is now committed, as approval of the United Nations Organization and the Bretton Woods institutions indicates, to a policy of expanding world trade. The United States has foreign investments greatly in excess of the investments of friendly foreign nationals here. The Department of State is even now attempting to secure complete equality of treatment for American property interests in areas in which the war was fought with respect to local legislation on war damage compensation. Under these circumstances, a deliberate legislative enactment of the United States which discriminates against friendly foreign nationals and denies to them even just compensation for seizures of their property by an agency of the United States (unless compelled by the Constitution) seems a short-sighted departure from principles which this Government has long

As a result of Mr. Byrnes' and others' objections, H. R. 5089, revised as H. R. 6890, was introduced in its later form by Representative Sumners. The later form, however, retained proposed Section 33(a) substantially as contained in H. R. 5089. (Proposed Section 33(b) elaborated the procedure for the just compensation action in the Court of Claims).

Coincident with the introduction of H. R. 6890 in the House, an identical bill, S. 2378, was introduced in the Senate. At the Senate hearings which were held in July a number of persons appeared and gave their views in opposition to proposed Section 33 ("Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 79th Cong., 2d Sess. on S. 2378"). Representatives of the Government sought to meet these arguments by contentions that the effect of the amendment to §5(b) made by the First War Powers Act, 1941, was to change 9(a) so as to deny to friendly foreign nationals the rights which they had previously enjoyed (Hearings, pp. 97-98).

In support of this contention, the decision of the Circuit Court of Appeals, Second Circuit, in *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, cert. granted, February 17, 1947, No. 346, this term, was cited and a copy thereof was introduced into the record (Hearings, p. 99). In its report on S. 2378 the Senate Committee on the Judiciary (S. Rep. 1839, 79th Cong., 2d Sess.) struck out proposed Section 33 in its entirety. In so doing they eliminated the provisions by which it was attempted to deny to a friendly

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advocated. The damage to American interests which might result cannot be adequately estimated.

The position of the United States in insisting upon equal treatment and just and adequate compensation for interest of American nationals abroad has been based upon the assertion, well-founded until now, that the United States accorded such treatment to the property and interests here of friendly foreign nationals. Should this position be destroyed, by enactment of the cited provision, the ability of the United States to prevent like discrimination against American foreign interests will be seriously jeopardized if not destroyed.

foreign national the relief and remedy provided under § 9(a) of the Trading with the Enemy Act and also the provision that notwithstanding § 7(c) of that Act, just compensation could be obtained through a suit in the United States Court of Claims.

The explanation embodied in its report (*supra* p. 2) leaves no modicum of doubt as to its intent in striking proposed Section 33:

> The first amendment by the Committee strikes out line 11 on page 1 and down to and including line 16 on page 8 [the portion of the Bill which was proposed Section 33]. The purpose of this amendment is to eliminate the proposal to cut off the right of a friendly foreign national to *sue for and obtain the return of his property under Section 9(a)*. The Bill as thus amended *preserves in full these rights under 9(a) which the friendly foreign national*, together with the United States citizen, has had for more than 25 years under the act. (Brackets and italics supplied)

Nor does it seem that there can be any doubt whatsoever that the Senate action was tantamount to an express repudiation of the dictum[14] of Judge Hand in respect of a remedy in the Court of Claims (*Silesian-American Corp.* v. *Markham, supra*, 156 F. 2d 793, 796-797) in view of the actual introduction of the Silesian opinion into the hearing record and the Government's attempted reliance thereon.

On July 25, 1946 Mr. McCormack, Majority leader of the House, in outlining the program of the House for the following day, stated (92 Cong. Rec. 10107):

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[14] Judge Hand's disregard of § 9(a) as an available remedy to the pledgee seems to be predicated upon the assumption that both parties conceded that no remedy was available under § 9(a) (p. 797), Debtor's counsel denies any such concession (Pet. br. in No. 346, this term, in this Court, p. 6).

If the circumstances of the seizure in that case were such as to require a remedy in the pledgee in order to validate, as to the debtor, the exculpatory provisions of amended § 5(b), that remedy was available in § 9(a). Cf. *Garvan, Custodian* v. *Certain Shares of International Agricultural Corporation*, 276 F. 206. Aff'd (CCA 1922), 283 F. 746.

> There is also a bill amending the War Powers Act, I think first one, which relates to the Alien Property Custodian's office. Unanimous consent for its consideration will be asked. I understand there is some objection to Section 33 of an organic act which is the first section of that bill, but that section has been stricken out by the Senate Committee and I understand the request will be to pass what would be the Senate bill as amended eliminating the objectionable features of the bill as reported out of the House Committee.

On the following day, July 26, 1946, Mr. Celler, Chairman of the Subcommittee of the House which conducted the hearings on H. R. 6890 and its predecessor bill H. R. 5089, moved to pass H. R. 6890, but with amendments (92 Cong. Rec. pt. 8, p. 10215). H. R. 6890, as amended in accordance with the proposal of Mr. Celler, struck out what was Section 33 of the Bill as first reported by the House Judiciary Committee and advanced the section numbers of the remaining sections. Mr. Celler, in the course of his management of the Bill on the floor of the House, in answer to the following query of a colleague, made the following response (92 Cong. Rec., pt. 8, p. 10218):

> Congressman Philbin: "If Section 33 is eliminated from this bill then the law as then written would give to foreign friendly nationals the right to be sued and to sue in our courts and have their rights adjudicated?"
>
> Congressman Celler: "I may say to the gentleman that the elimination of Section 33 gives the right to a *foreign national to sue for the return of his property* either in law or in equity. That does not apply to an enemy alien, only to a friendly foreign national. That right remains unchanged if we eliminate Section 33." (Italics supplied)

H. R. 6890, with the proposed Section 33 stricken out, was passed on July 29. On August 8, 1946, the President approved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia should be affirmed and the case permitted to go to trial on its merits.

Respectfully submitted,

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APPENDIX

STATUTES, TREATY, OPINION AND ORDERS.

Statutes.

THE TRADING WITH THE ENEMY ACT

Section 2 (40 Stat. 411), 50 U. S. C. Appendix, Section 2:

The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States, and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The word "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require may, by proclamation, include within the term "ally of enemy." . . .

* * * * *

Section 5(b), as amended by Title III of the First War Powers Act of 1941 (55 Stat. 839), 50 U. S. C. Appendix, Section 5(b):

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or

property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision. . . .

. . . . . .

Section 7(c) (40 Stat. 1020), as amended, 50 U. S. C. Appendix, Section 7(c):

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

. . . . . .

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

Section 9(a) (41 Stat. 977), as amended, 50 U. S. C. Appendix, Section 9(a):

Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from any enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place

of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Section 12 (40 Stat. 460), as amended, 50 U. S. C. Appendix, Section 12:

* * * The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *.

Section 17 (40 Stat. 425), 50 U. S. C. Appendix, Section 17:

The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of

appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

Treaty of Friendship, Commerce and Extradition Between the United States and Switzerland.

(11 Stat. 587), Senate Document No. 357, 61st Congress, 2d Session, p. 1764 (Malloy Treaties, Conventions, Vol. II, page 1764)

ART. I

The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland * * * shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

The foregoing privileges, however, shall not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors.

Letter from the Swiss Minister (Peter) to the Acting Secretary of State (Phillips), January 8, 1935, M. S. Department of State, File 811.5034/170, as Quoted in III Hackworth, Digest of International Law, 432-3.

Your answer of January 3, 1934, is indeed apt to give to the Convention a considerably different and much more limited comprehension than the one my Government and

the Courts in Switzerland have given it up to now. To start with, my Government holds that the question of whether or not corporations are mentioned in the treaty of 1850 is not decisive. It is clear that the only reason for their omission must have been the fact that corporations did not yet play any important part in the economic life of the time. But there was certainly no intention of depriving citizens of both parties of their treaty rights in such cases where they do not act personally but through the means of a corporation. It is to be admitted that the treaty contains various provisions which by the circumstances they involve apply only to physical persons; but there are, besides, other provisions concerning in the first place property rights where the entitled parties may be physical persons as well as corporations. The language of the treaty, in consequence, does not appear opposed to its application to corporations, insofar as their legal capacity allows it. It may be added, as a matter of course, that my Government does not want to contend that the corporations have in every case, on basis of the treaty, a right to receive the same treatment as physical persons. The application of the treaty to the corporations can only take place by analogy, mainly in the sense that the basic principle of the equal treatment provided for in the treaty applies to them as well, with the understanding that the corporations of one of the parties under equal conditions are not to be treated more unfavorably on the territory of the other party than its own corporatons. This principle would, for example, allow one of the States of the Union to grant to a Swiss corporation only such status as it accords to a corporation whose principal seat is located in some other State of the Union.

It seems to my Government, therefore, that if the above interpretation goes further than the strict language of the treaty, it has on the other hand the advantage to take the spirit of the treaty into better account.

Executive Order No. 9095.

(7 Fed. Reg. 1971)

Establishing the Office of Alien Property Custodian and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution, by the Trading with the Enemy Act of October 6, 1917, as amended, by the First War Powers Act, 1941, and as President of the United States, it is hereby ordered as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Order.

2. All power and authority conferred on the President by Sections 5 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by Sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941, except such powers and authority as were delegated to the Secretary of the Treasury by Executive Orders issued prior to February 12, 1942, and to the Board of Governors of the Federal Reserve System by Executive Order No. 8843 of August 9, 1941 (which powers and authority shall continue to be vested in and exercised by the Secretary of the Treasury and the Board of Governors respectively), are hereby delegated to and vested in the Alien Property Custodian. The memorandum of February 12, 1942, delegating to the Secretary of the Treasury certain powers and authority under said sections, is hereby revoked and canceled. Any and all action heretofore taken by the Board of Governors of the Federal Reserve System after February 11, 1942, in pursuance of Executive Order No. 8843 of August 9, 1941, is hereby confirmed and ratified. In the exercise of the au-

thority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

3. Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct; and, in the case of any property, or interest therein, subject to the control of the Secretary of the Treasury, when the Alien Property Custodian shall notify the Secretary of the Treasury in writing that he has so directed, the Secretary of the Treasury shall release all control of any such property, or interest therein, to the Alien Property Custodian.

4. Any outstanding order, proclamation, regulation, ruling, license, or instruction issued pursuant to, or relating to the administration of, any power or authority vested in the Alien Property Custodian by this Order shall remain in effect unless and until amended or revoked by the Alien Property Custodian.

FRANKLIN D. ROOSEVELT

The White House,
March 11, 1942.

Executive Order No. 9193.

(7 Fed. Reg. 5205)

Amending Executive Order No. 9095 Establishing the Office of Alien Property Custodian and Defining Its Functions and Duties and Related Matters.

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the

President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Executive Order.

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit

instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, money, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

(d) Any patent, patent application, design patent, design patent application, copyright, copyright application, trademark or trademark application or right related thereto in which any foreign country or national thereof has any interest and any property of any nature whatsoever (including, without limitation, royalties and license fees) payable or held with respect thereto, and any interest of any nature whatsoever held therein by any foreign country or national thereof;

* * * * *

4. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order. The Secretary of the Treasury and the Alien Property Custodian each shall make available to the other all information in his files to enable the other to discharge his functions, and shall keep each other currently informed as to investigations being conducted with respect to enemy ownership or control of business enterprises within the United States.

* * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive

Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 shall be administered by him in conformity with the provisions of this Executive Order.

7. In the exercise of the authority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

* * * * *

9. This Executive Order shall not be deemed to modify or amend Executive Order No. 8843 of August 9, 1941, and the regulations, rulings, licenses and other action taken thereunder. Any and all action heretofore taken by the Secretary of the Treasury or the Alien Property Custodian, or by any person, agency, or instrumentality designated by either of them, pursuant to sections 3(a) and 5(b) of the Trading with the enemy Act, as amended, or pursuant to prior Executive Orders, and any and all action heretofore taken by the Board of Governors of the Federal Reserve System pursuant to Executive Order No. 8843 of August 9, 1941, are hereby confirmed and ratified.

10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose

of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended.

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3(a) and 5(b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941.

* * * * *

(Signed) FRANKLIN D. ROOSEVELT

The White House,
July 6 - 1942.

Opinion in the Matter of Leopold H. P. Klotz, et al.

OFFICE OF ALIEN PROPERTY CUSTODIAN
VESTED PROPERTY CLAIMS COMMITTEE.

Dockets No. 9 and 10
Claims No. 553 and 554

In the Matter of

LEOPOLD H. P. KLOTZ, and

NORTH AMERICAN INVESTING CO., INC.

STATEMENT OF CASE

This proceeding was initiated by Notice of Claim No. 553 (dated March 29, 1943) filed by Leopold H. P. Klotz and by Notice of Claim No. 554 (dated March 25, 1943) filed by the North American Investing Company, Inc., a Delaware Corporation, pursuant to regulations issued by the Alien Property Custodian on March [illegible] 1942 (7 Fed. Reg. 2290) and amended December 1943 (8 Fed. Reg. 16709). The claims were consolidated for a hearing.

The Custodian by Vesting Order No. 3, dated April 7, 1942 (7 Fed. Reg. 2698), vested certain properties consisting of notes issued by Luscombe Airplane Corporation (hereinafter referred to as Luscombe) to Leopold H. P. Klotz, (hereinafter referred to as Klotz), collateral notes issued by North American Investing Company, Inc., (hereinafter referred to as the North American Company) to Klotz, collateral security deposited with Klotz to secure payment of the collateral notes, a contract between the North American Company and Klotz, and all the interest of Klotz in shares of Luscombe; all of which property is described in detail in Exhibit "A" attached to Vesting Order No. 3. The vesting order also recited, among other things, a finding that the property was the property of nationals of a foreign country designated in Executive Order 8389.

Klotz's Notice of Claim alleges that the claimant is a "* * * * subject of a friendly country, Liechtenstein * * * *"

DETERMINATION

The claimants so clearly satisfied their burden of proving ownership on the date of vesting of the property subject to Vesting Order No. 3, that an extensive recital of the evidentiary facts relating to ownership seems unnecessary. * * *

There is no evidence tending to contradict Klotz's testimony that he owned the assets so used and there is no reason to believe that he held such assets in trust for any person or that he had acquired the assets in any manner other than that indicated above. * * *

The claimant, Klotz, is a resident of the United States and was a resident of the United States at the date of vesting. He was for many years a citizen of Germany, but we find, for the purpose of this proceeding, that he became a citizen of Liechtenstein not later than 1939. * * *

It becomes necessary to consider whether the claimants, on the basis of the facts found above, are entitled to a "divesting" of the property.

If the property had been vested after July 6, 1942—the date of Executive Order 9193 which amended Executive Order 9095—the answer would be in the affirmative because Executive Order 9095 as amended by Executive Order 9193 clearly contemplates that, unless good reason to the contrary appears, business enterprises and litigated claims of residents of the United States, even though they be citizens of enemy countries, are not to be vested.[1] In this respect

[1] "The term 'designated enemy country' shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term 'national' shall have the meaning prescribed insection 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a *designated enemy country* unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. * * * " (Section 10 of Executive Order No. 9193).

*Emphasis supplied.

Executive Order 9095 as amended by Executive Order 9193 paralleled in substance Section 2(c) of the original Trading with the Enemy Act which did not permit citizens of an enemy country who were residents of the United States to be treated as enemies unless the President so required by proclamation. Such a proclamation was not issued.

The Vesting Order in this proceeding was, however, issued prior to July 6, 1942 and recites that it is an expression of Presidential authority under Section 5(b) of the Trading with the Enemy Act as amended. On the date of the issuance of the vesting order the Presidential power to vest "any property or interest therein, of any foreign country or national thereof," had been delegated to the Custodian by Executive Order 9095 of March 11, 1942 (7 Fed. Reg. 1971). Executive Order 8389, as amended April 10, 1940 (5 Fed. Reg. 1400) relating to the freezing powers of the Secretary of the Treasury, granted to the Secretary, among other things, the power to regulate transactions and property interests of "any foreign country designated in this order or any national thereof" (Executive Order 8389, Section 1). Executive Order 8389 also contains an elaborate definition of the term "national" which includes "any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of the order." [Executive Order 8389, Section 5E(i)]. This definition of "foreign national" was incorporated by reference into Section 302 of the First War Powers Act, 1941, which amended 5(b) of the Trading with the Enemy Act into the form operative in this case.[2] Therefore, the term "foreign national" as defined in Executive Order 8389 and as employed in Section 5(b) as amended and as used in Executive Order 9095 before its amendment on July 6, 1942, seemingly encompasses Klotz for he is by his own claim and testimony a citizen of Liechtenstein which is a foreign country designated in Executive Order 8389, as amended, and hence is a "foreign national." For the same reason it would seemingly include the claimant, North American Investing Company, Inc., because although it is a Delaware Corporation, Klotz, a foreign national, held a "substantial part" of its "notes" and other "obligations". [Executive Order 8389, Section 5E(ii)].

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[2] All • • orders • • heretofore • • issued by • • the President or the Secretary of the Treasury under the Trading with the Enemy Act of October 5, 1941 [1917] (40 Stat. 411) • • are hereby • • ratified • • ." (Brackets supplied)

The grant to the Custodian of the wide authority to vest[3] was accompanied, however, by authority to adopt, in his discretion, a vesting practice less extensive.[4] The Custodian did adopt a vesting practice less extensive than his authority, a practice substantially corresponding to the provisions of the July 6, 1942 amendments to Executive Order 9095 and to the policy expressed in Section 2(c) of the original Trading with the Enemy Act. The vesting practice—as far as pertinent to this proceding—was not to vest the property of residents of the United States regardless of citizenship, except on information serving as the basis of an administrative judgment of cloaking.[5]

A similar development has taken place under Executive Order 9193. By Section 2(d) of this Executive Order, the Custodian has granted the right to vest any such property "in which any foreign country or national thereof has any interest." However, in the publication in which the Custodian announced his program thereunder there was no mention of seizure of neutral owned patented property, but only of enemy and enemy-occupied property. See "Patents At Work 1943", especially pp. 5-7. This practice, less extensive than the right granted in Section 2(d) of Executive Order 9193, has resulted in divesting orders in patent cases in which the divesting is on the ground of a mistake in vesting—corrected by finding that the claimant is not a national of a designated *enemy* country—but without tra-

[3] " * * * and *any property* or interest of *any foreign country* or *national* thereof *shall vest*, when, as, and upon the terms directed by the President * * *" (Section 302 of First War Powers Act of 1941). Emphasis supplied.

[4] " * * * and any property or interest of any country or national thereof shall vest *when, if*, and *upon the terms*, directed by the President * * *" It seems incontestible that Congress intended that the Custodian should be free to adopt a vesting practice, according to the exigencies of the situation, less extensive than the power to vest property of any person who has been "domiciled in, or a citizen or resident of a foreign country on or at any time since the effective date of this order" [Executive Order 8389, Section 5E(i)]. Executive Order 8389 was directed to the task of regulating transactions in the economic warfare which ante-dated Pearl Harbor and obviously was not directed to the narrower problem of vesting property—a problem not arising until the outbreak of the war. Emphasis supplied.

[5] General Counsel's brief states, "so far as we are aware no cases arose during the 9095 period in which the vesting was on the ground of 'national interest' apart from cloaking".

verse of the finding recited in the vesting order that the claimant is a national of a *foreign* country. See Divesting Orders 32, 33, 35, 37, 38, 57.

We conclude that the administrative practice of the Custodian during the 9095 period is based upon a construction of the broad terms of Section 5(b) as amended and of Executive Order 9095 which reflects the earlier legislative policy expressed in Section 2(c) of the Trading with the enemy Act and which is itself reflected in the July 6, 1942 amendments to Executive Order 9095. We further conclude that while an administrative construction is open to change by the agency—as the exigencies of the situation change—the unchanged practice does outline the standards whereby the agency purports to act as effectively as if they were expressed in a regulation. It follows, therefore, that, in the light of the Custodian's practice, a vesting which proceeded from the assumption—subsequently proved to be erroneous—that there was a "cloaking" transaction involves such a mistake of fact as authorizes a "divesting".

In so holding, we do not mean that the Custodian may not by regulations alter the construction manifested by his practice; nor do we mean that a practice in respect to vesting is relevant to the exercise of supervisory powers. We do not suggest, furthermore, that an administrative practice is controlling in purely discretionary judgments on matters not relating to the construction of jurisdictional statutes or Executive Orders; nor do we suggest that a divesting is possible merely because experience has demonstrated that a given vesting was less sound as a matter of policy than it as first appeared. We hold merely that the well established administrative practice of the Custodian with respect to vesting during the 9095 period justifies the finding that the vesting of the property of one who was at the time of vesting a resident of the United States and a citizen of a neutral and unoccupied foreign country—based upon the mistaken belief that he was a "cloak"—constitutes such a mistake of fact as authorizes a remedial divesting.

Accordingly, the claims of Leopold H. P. Klotz and North American Investing Company, Inc., are hereby allowed.

VESTED PROPERTY CLAIMS COMMITTEE

JOHN C. FITZGERALD, *Chairman*
MICHAEL F. KRESKY,
NUGENT DODDS.

(SEAL)

Date May 2, 1944

Annual Report

Office of

Alien Property Custodian

Fiscal Year Ending June 1945

(pp. 161-162)

Authority to Dispose of Title Claims

In the course of the vesting program the Custodian has taken title to a number of properties which may be proved to be owned by citizens of the United States and friendly foreign nationals.

Three factors account for the vesting of property which is or may be owned by American citizens residing in the United States. *First*, there have been technical errors in drawing up vesting orders; for example, in vesting orders covering thousands of patents there have inevitably been instances in which American-owned patents were included through clerical or tabulating machine errors in recording patent numbers. *Secondly*, there have been a few mistakes made in determining the ownership of property or in determining the citizenship or residence of the owners; as an illustration, properties have been vested because the record ownership was in enemy nationals and there was at the time of vesting no information available to indicate that the beneficial owners were actually American citizens. *Thirdly*, there are many properties of which ownership prior to vesting was claimed by American citizens but which the Office has concluded after exhaustive investigations were beneficially owned by nationals of enemy countries. This third group is the most important; it includes all of the cases in which the Office believes that transfers of property from enemy nationals to United States citizens during the years 1939 to 1941 were not bona fide but were made to evade seizure by the Government in the event of war. The conclusions of the Office in these cases may be upset if the American claimants can show that the transfers were actually bona fide.

The vesting of property of friendly foreign nationals[3] was, in many instances, the result of these same three

[3] As used here the term "friendly foreign nationals" includes (1) citizens of allied and neutral countries not residing voluntarily in enemy countries, (2) citizens of enemy countries residing

factors. It also resulted in large measure from certain policies of the Office during the war, of which the taking of title to patents and copyrights owned by residents of enemy-occupied countries is of predominant importance.

The Office has returned property to a number of persons who are both citizens and residents of the United States and who have satisfactorily established their pre-vesting ownership of the property. The legal basis for such returns is Section 9(a) of the Trading with the Enemy Act.

In view of legal uncertainties, however, and deeming it incumbent upon him to coordinate his action with the position taken in litigation by the Attorney General, the Custodian has adopted a policy of withholding action on the return of property to friendly foreign nationals until the authority to effect such returns is clarified by judicial decision or statutory enactment. The precise problem is whether Section 9(a) of the Trading with the Enemy Act permits the return of property to persons who are foreign nationals under the First War Powers Act, 1941, but who are not enemies. Under Section 9(a) of the Trading with the Enemy Act, a person who is not an enemy may recover property owned by him at the time of vesting. This means, if taken literally, that the Custodian may make returns to persons not enemies at the time of vesting. But under the authority of the First War Powers Act, the Custodian may vest the property of foreign nationals, including non-enemies. Thus the question has arisen whether a friendly foreign national may recover property pursuant to one act when the vesting of the property of such persons is authorized by a subsequent act.

In order to provide a clear statutory basis for the return of property to foreign nationals who are not enemies the Office has drafted a bill, which was introduced into the House of Representatives as H. R. 3479 on June 14, 1945, and subsequently introduced in slightly amended form as

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in the United States, and (3) United States citizens residing in foreign countries. All of these persons are "foreign nationals" within the meaning of the First War Powers Act of 1941. The adjective "friendly" is employed in the text of this Report to distinguish these groups of foreign nationals from nationals of enemy countries.

H. R. 3750 and later as H. R. 4571.[4] This bill provides that all returns to foreign nationals will be discretionary on the part of the Custodian and will not be made in instances where it would be contrary to the national interest.

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[4] Earlier attempts to obtain similar legislation were made by the Office in June 1944, and again in January 1945. The bills then introduced were not reported out by the Judiciary Committee of the House. H. R. 4571 was signed by the President on March 8, 1946, and is now Public Law 322, 79th Cong., 1st Sess.